FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

July 27, 2011

MACH MINING, LLC.,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. LAKE 2009-716-R
v.	:	Citation No. 8414529; 09/21/09
	:	
	:	Mine: Mach No. 1
SECRETARY OF LABOR,	:	Mine ID: 11-03141
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent.	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2010-190
Petitioner,	:	A.C. No. 11-03141-201809
	:	
v.	:	
	:	
MACH MINING, LLC.,	:	
Respondent	:	Mine: Mach No. 1 Mine

AMENDED DECISION [1]

Appearances: Edward Hartman, Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois, for the Petitioner.
Christopher Pence, Allen, Guthrie & Thomas, Charleston, West Virginia, for the Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Mach Mining, LLC, ("Mach") at its Mach No. 1 Mine (the "mine") near Johnston City, Illinois, pursuant to

[1] This decision is amended to correct minor clerical errors, including the penalty amount on the final page.

sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act:" or "Act"). The case includes one violation assessed a total penalty of $4,000.00. The parties presented testimony and documentary evidence at the hearing held in St. Louis, Missouri commencing on June 15, 2011.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mach's No. 1 Mine, which began mining coal in 2005, is an underground coal mine near Johnston City, Illinois. Coal is mined using continuous miners that develop gate roads, and a longwall shearer to retreat-mine panels. (Tr. 7). The gate roads that contain the loader, power center, and other longwall infrastructure, are referred to as the "headgate entries," while the entries on the opposite side are refereed to as the "tailgate entries." At the time the order in question was issued, Mach had completed mining longwall Panel No. 1, and was in the process of mining longwall Panel No. 2 and driving the headgate road for Panel No. 3. Mach had a base ventilation plan in place, as well as a site-specific plan for each of the panels being mined.

At hearing, the parties stipulated that Mach Mining is an operator of an underground coal mine, and that the mine is subject to the jurisdiction of the Act and the Commission. The parties further stipulated that Mach is a large operator and that the $4,000.00 penalty proposed by the Secretary will not hinder its ability to continue in business. (Tr. 8, 16). A history of assessed violations was admitted as Sec'y Ex.12. (Tr. 107).

A. Citation No. 8414529

1. *The Violation*

The violation in this case is related to the ongoing negotiation of the ventilation plans for Panel Nos. 2 and 3, but is not a citation issued due to an impasse in plan negotiations. This citation is also related to a citation issued on March 13, 2009 by Inspector Bobby F. Jones, Order No. 8414238. Jones issued a 104(d)(1) order, after he discovered that Mach had mined past the projection point described in its ventilation plan. Mach had previously submitted, as part of its ventilation plan, a map showing three longwall panels, each of which were 18,000 feet in length. The ventilation plan, as submitted, was approved in March 2008. On March 13, 2009, Jones discovered that the Respondent, in violation of its approved ventilation plan, had mined 1,000 feet beyond the proposed set up room in Headgate No. 3. By mining 1,000 feet past its projected point, Mach created a stair-step effect and, thus, changed the design of its ventilation plan. After the order was issued by Jones, Mach filed a notice of contest and, in April, 2009, after a submission of the issue on the record, ALJ Manning issued an order in which he determined that the mine violated its ventilation plan when it mined beyond the proposed area and created the stair-step system not listed in the plan.[2]

[2] Subsequently, ALJ Manning set the remaining issues for hearing in September, 2009, but prior to the hearing and while the parties were negotiating a new plan, the Secretary terminated the citation.

Mach began working on an amended ventilation plan for longwall 3, and, after a number of meetings both in the district office and at the MSHA national office in Arlington, Mach submitted a revised plan, as well as information previously requested by MSHA on September 3, 2009. On September 9, 2009, Jones terminated Order No. 8414238 with a one sentence pronouncement, "MSHA hereby terminates this order." Shortly after the order was terminated, on September 20, 2009, Mach resumed mining in the Headgate No. 3 area, thereby resulting in Order No. 8414529, i.e., the order at issue in this case issued on September 21, 2009 by Inspector Philip Long. The parties continued to discuss the provisions of both the base ventilation plan and the plan specific to Headgate No. 3. Eventually, the parties reached an impasse. As a result, MSHA issued two technical citations and letters of deficiency on September 29, 2009. The Respondent filed a notice of contest to the two citations and a hearing was held to resolve the plan dispute on November 3, 2009. Following the hearing, I issued a decision in which I determined that the District Manager did not abuse his discretion in requiring certain portions of the plan.

The order that is the subject of this case was issued by Inspector Long after the parties began negotiations on the general ventilation plan and the plan specific to Headgate No.3, but before the parties reached an impasse. On September 20, 2009, Mach resumed production in Headgate No. 3 asserting that the termination of Order 8414238 not only terminated the violation**,** but that it also approved Mach's new ventilation plan. Inspector Phillip Long issued the subject order on September 21, 2009, for a violation of 30 C.F.R. § 75.370(d). The citation alleges the following:

> The extraction of coal by the normal mining process had resumed on the No. 3 Headgate Unit, MMU 002, prior to the proposed ventilation plan being approved by the district manger. The mining process had started in No.3 Entry, inby the No. 176 crosscut. Approximately 10' of advanced had been made on the curtain side of the entry. This order is issued upon the direction of district manager.

Inspector Long testified regarding the issuance of Order No. 8414529 and the reasons therefore. Long, who is currently retired, was a MSHA Coal Mine Safety and Health Inspector for eleven years. Prior to becoming an inspector, Long worked in the coal industry for 28 years, primarily with Old Ben Coal Company. He held various positions and worked many years in the safety department. Long is a veteran of the United States Air Force, attended Southern Illinois University for a time, and has taken additional classes throughout his career. (Tr. 17-21).

Long was assigned to follow Jones in the rotation to inspect the Mach No. 1 Mine beginning in July, 2009. Prior to conducting his first inspection at Mach, he discussed the history of the mine with Jones, as well as the outstanding citations and orders. Jones explained that he had issued Order No. 8414238 for a ventilation violation in March, 2009, which remained in effect. Long understood that no ventilation plan for Headgate No. 3 had been approved, and that mining was not occurring on that panel. Long testified that he reviews the mine file each time he conducts an inspection. From the time he began inspecting the Mach No. 1 mine until

the time he issued this order on September 21, 2009, Long did not see any approved ventilation plan in the mine file, nor was he notified that any ventilation plan had been approved. (Tr. 23-25). Long did not terminate the order issued by Jones, but was aware that Jones' supervisor, Rennie, instructed Jones to terminate the order in September. Long had no further information about the issuance or the termination of Jones' order. (Tr. 25-26).

As Long began his inspection rotation at Mach, he had conversations about the ventilation plan with Anthony Webb, president of Mach, as well as with other managers at the mine. Long testified that, on several occasions, he discussed with Webb, Webb's concern with the ventilation plan, particularly after Jones had terminated the Order No. 8414238 on September 9, 2009. Long made several notes about the conversations, including Sec'y Ex. 9, Long's inspection notes for September 16, 2009. The notes demonstrate that Long spoke with Webb on that day and discussed that the mine was awaiting ventilation plan approval. Further, the notes reflect that Webb expressed his concern that it might take some time to win approval. (Tr. 26-27). Next, Long's notes from September 17, 2009, refer to a conversation with Webb while conducting an inspection on that date. Sec'y Ex. 10. Again, Long spoke with Webb and discussed the start up of the Headgate No. 3 unit. The two of them discussed the plan approval process and the fact that the mine continued to wait for MSHA approval. Additionally, on that date, Webb asked Long if "paper would be issued" if Mach started up without a plan. Long responded that it was "more than likely" that it would be issued. Long testified that he answered the inquiry based upon his understanding that no ventilation plan had yet been approved for the Headgate No. 3 area. If the plan had been approved, he would have told Webb to continue mining. (Tr. 30-33). I find Long to be a very credible and knowledgeable witness, who responded with thoughtful, candid, and detailed answers.

On September 21, 2009, Long issued the Order No. 8414529 to the mine, Sec'y Ex. 6, for operating without an approved plan. Long's notes underscore that, on September 21, 2009, he spoke first with Chris England. Sec'y Ex. 7. England told Long that the mine was very close to starting up in Headgate No. 3 and asked if Long was going to issue an order if they started up. Long responded "yes," that he would issue an order if the plan had not been approved. (Tr. 34-36). Long then learned from Webb that the mine had in fact started production in Headgate No. 3. Long told the Respondent that he would travel to the area to confirm that mining was taking place, and, if he discovered that mining was occurring, he would issue a 104(d)(2) order pursuant to 30 C.F.R. § 75. 370(d) for not having an approved ventilation plan in place. Long then traveled underground, observed mining in Headgate No. 3, and issued the order for mining without an approved plan. Upon observing the mining in Headgate No. 3, Long telephoned the district office and spoke with the District Manager before he issued the violation as an unwarrantable failure to comply. Long agreed that he was instructed to issue the violation, but he also indicated that, while he was instructed to issue the order as "reckless disregard," he instead issued it as "high" negligence, which is what he believed it should have been. At no time did Long understand that Webb, or any other person at the mine, was operating under the assumption that the termination of the order previously issued by Jones was tantamount to an approval of the ventilation plan. (Tr. 36-41).

Anthony Webb testified on behalf of Mach. It was his belief that a ventilation plan was

approved when Order No. 8414238 was terminated by Jones and, therefore, no violation exists. (Tr. 89). Webb, the president of Mach mining, is responsible for all actions at the mine, both on the surface and underground. Part of his responsibility, both currently and in 2009, includes the development of ventilation plans. (Tr. 66-67). Webb explained the sequence of events leading up to the citation issued by Long with little variance from the description provided by Long. He began with a meeting held on February of 2009. Webb asserted that Mach originally began negotiating the bleeder system of Panel No. 2 due to poor roof conditions and MSHA's concern about the airflow. Mach told MSHA of its intent to mine inby the Panel No. 2 bleeders in order to work around the bad roof it had encountered. (Tr. 70-72). Webb had several meetings with MSHA personnel and MSHA sought a map depicting the connection between Panel Nos. 2 and 3. On February 24, 2009, Mach representatives traveled to Arlington to meet at MSHA headquarters with a number of people, including the deputy administrator for coal. During that meeting, MSHA again asked for the map and Webb testified that he "forgot" to give District 8 the map. It was mailed the next day. Mach Ex. B. (Tr. 72). MSHA did not agree with the changes Mach sought to make and began further discussions about the ventilation of Panel No. 2. MSHA subsequently issued a "technical citation," Mach Ex. C, after the parties reached an impasse regarding the Headgate No. 2 area. Mach contested the citation and the case was assigned to ALJ Manning and set for hearing in April. (Tr. 75). Mach continued to work with MSHA and the parties resolved the matter prior to the hearing. Subsequently MSHA vacated the citation on April 15, 2009. The mine, with MSHA's acknowledgment, then reverted to the plan they had suggested. The mine did not receive a letter formally approving Panel No. 2, and no other actions were taken. (Tr. 76-78). It is important for purposes of the Mach defense to note that this citation was not terminated, and was, instead vacated, and the parties reverted back to an earlier plan.

Webb testified that, in the meantime, on March 13, 2009, Jones issued an order for an alleged ventilation violation at Headgate No. 3 for mining beyond the area depicted on the ventilation plan and creating, in effect, a stair-step ventilation system. This citation was not issued as a technical violation as a result of an impasse in the ventilation negotiation. Again, Mach contested the order issued by Jones and, again, the case was assigned to ALJ Manning. Mach requested a second meeting in Arlington and met with MSHA on March 18, 2009 concerning the Panel No. 3 plan. District 8 ventilation plan specialists attended by telephone. District 8 was instructed to lay out for Mach what it expected to see at Panel No. 3 and, subsequently, Mach met again with the District 8 office. Mach then submitted "what they felt . . . [MSHA] had requested." (Tr. 79-80). In late May, while negotiations continued, Mach came up for a regular six month review of its base ventilation plan at the mine. The base plan was submitted to MSHA on June 4, 2009. In response to its submission, Mach learned of a new regulation requiring a justification for the use of belt air in the intake. The justification submitted by Mach was rejected and the parties held another meeting to discuss that issue. (Tr. 82). After meeting with the district office, Mach once again sought and was granted the opportunity to meet with the coal supervisors in Arlington on July 7. At that meeting, the parties discussed a number of issues, including the belt air. MSHA asked Mach about Headgate No. 3, and Mach acknowledged that the district office had requested further information, which had not initially been provided, about the ventilation for that area. (Tr. 82-83).

Webb explained that, in the meantime, ALJ Manning decided, through written submissions, that Mach had indeed violated the mandatory standard by mining the stair-step system in Headgate No. 3 without prior approval. However, Manning did not immediately rule on the negligence or penalty associated with the violation. During this time, while negotiations were ongoing, MSHA refused to terminate the citation issued on Panel No. 3. On August 6, Webb received a letter, Mach Ex. E, that set forth in writing the discussions already held with MSHA. According to Webb, the letter set forth a plan for submission by Mach to receive approval of a ventilation plan for Headgate No. 3. While Webb insists that the letter contained information about what Mach needed to do to "terminate the March 13th D order[,]" it really addresses requirements for a ventilation plan. Webb decided that he would ask ALJ Manning to decide if Mach had submitted an acceptable ventilation plan, which would then result in the order being terminated. On August 18, Manning agreed that he retained jurisdiction over the order assigned to him and set the matter for hearing in September. The issue was not heard by Manning because MSHA terminated the order prior to the hearing date. (Tr. 83-86)

Webb testified that, on September 3, 2009, he sent a letter to the District Manager for MSHA District 8 and included information previously requested by MSHA to support the ventilation plan being proposed by Mach for Headgate No. 3. Mach Ex. F. Webb asked that MSHA terminate the order issued by Jones in March, and provided information regarding the ventilation plan in Panel No. 3. (Tr. 86-87). Shortly thereafter, on September 9, 2009, and without any indication that the ventilation plan had been approved, Jones terminated the order. Webb opined that the termination of the order was the relief that Mach sought from ALJ Manning, and he believed the termination would allow them to continue mining in Headgate No. 3. At the time Jones issued the termination of the order, he advised Webb to speak with his supervisors in order to understand why it was terminated and what it would mean for the mine. Webb called Rennie, the supervisor of Jones, but Rennie could not provide an answer and referred Webb to the District Manager. Webb chose not to contact the District Manager, and, instead, chose to believe that the termination was tantamount to an approval of a ventilation plan. Webb next had a number of conversations, as detailed by Long and discussed above, wondering when the ventilation plan would be approved and asking Long if a citation would be issued if the mine continued mining activity in Headgate No. 3. In each instance, Long explained that a citation would issue if no plan were in place. (Tr. 88-89).

Webb testified that, on September 17, 2009, Mach's attorney wrote a letter to the Secretary explaining why he believed the plan had been approved and notifying MSHA that mining would commence in Headgate No. 3. Mach Ex. G. In the meantime, as Webb described, he believed that he had an approved plan, by virtue of the termination, commencing on September 9, 2009. He prepared to mine Headgate No. 3. (Tr. 89-90).

Webb explained that he attended nearly every meeting with MSHA, both locally and at the national office, and was familiar with all of the information relevant to the ventilation plan for Headgate No. 3. Webb believed that he had made every effort to communicate with MSHA and let them know of his plan. He testified that he was never told he could not resume mining, and he believed that the plan had been approved when the order was terminated. He based his belief on the fact that he had recently submitted the information sought by MSHA and because

he sought termination of the order from ALJ Manning. (Tr. 92-34).

I do not find Webb to be a credible witness, and find that his testimony was an after-the-fact attempt to make excuses for his actions. Webb acknowledges that he spoke with Long a number of times and told him the mine was awaiting MSHA approval of the ventilation plan, even after Order No. 8414238 had been terminated by Jones. (Tr. 96). On September 16, Long spoke to both Webb and England, and one or both of the men told Long that the company was awaiting plan approval. Webb's testimony is contradictory in that he testified on the one hand the plan was approved on September 9, 2009 with the termination of the order and on the other hand when he spoke to Long on the 16th and the 17th, he told him that Mach continued to wait for plan approval. Webb acknowledged that he did ask Long if a citation would be issued if he continued mining, but he was only seeking to gain information from Long about the district's position. Webb further agreed that Rennie instructed him to speak to the district office of the termination of the order issued by Jones, yet Webb chose not do so. (Tr. 99-100). Even though, it was important to Mach to begin operations in the Headgate No. 3 area, Webb did not feel he could call the district and speak to the only person who could approve the plan to clarify if it had been approved. Webb had been involved in the plan negotiation and had spoken a number of times to the district manager, as well as to supervisors in the Arlington headquarters and I find that he was aware that no ventilation plan had been approved. Webb did not receive any approval in writing, nor was he told by anyone at MSHA that he could continue to work in Headgate No. 3..

Mach argues that the termination of a cited condition means that the condition has been corrected. Mach cites *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288 (Aug. 1992), for the premise that "the purpose of a termination notice is to indicate to an operator that it has successfully abated a violative condition," and points out that MSHA's own interpretation was that "termination of a citation means that the cited condition no longer exists, since abatement has been accomplished . . . ." Mach Prehearing Br. 4. I don't find that argument persuasive given the negotiations necessary for plan approval and the breadth of a ventilation plan.

Termination of a prior citation does not constitute the proper procedure for approval and, here, the termination did not address the many facets of the ventilation plan required by the regulations. The ventilation plan is either approved in writing or disapproved by the District Manager. *Sewell Coal Co., v. Sec'y of Labor*, 2 FMSHRC 2210, 2117 (Aug. 1980) (ALJ). The Secretary's regulations require that the operator develop and follow a ventilation plan approved by the district manager. The plan must be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan must consist of two parts, i.e., the plan content as prescribed in section 75.371 and the ventilation map with information as prescribed in section 75.372. Only that portion of the map which contains information required under 75.371 will be subject to approval by the district manager. Among other things, ventilation plans are required to show the type and location of mechanical ventilation equipment installed and operated in the mine, as well as the quantity and velocity of air reaching the working face. Given these many plan requirements, an order terminating a violation, issued by an inspector, does not in any way substitute for plan approval. Further, an order is not a written approval by the district manager and to agree otherwise would open the

door for mine operators to imagine many ways in which a plan could be created. The regulation is exceedingly clear; "[t]he district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision." 30 C.F.R. § 75.370(c)(1). There is no dispute that the District Manager did not provide a written approval of the plan for Headgate No. 3.

Mach argues that, when MSHA earlier issued a technical citation on Panel No. 2, the parties negotiated the plan and MSHA subsequently vacated the citation without a new written plan. I can not agree with Mach that the "vacatur of citation 8414236 was the writing that approved Mach's ventilation plan for panel 2." Resp. Br. 4. However, even it were, there are several obvious differences. First, the order for Panel No. 2 was vacated, not terminated. Second, the order on Panel No. 2 contains specific language about the ventilation plan requirements in the document vacating the order. Finally, when vacating the order for Panel No. 2, MSHA made it clear that Mach could continue to use the plan that had been in place at the time the order was issued. The termination issued by Jones did not address the ventilation plan in any way. Given the obvious differences, and the requirements for plan approval, it is hard to imagine that a reasonable person with the experience of Mr. Webb could legitimately believe that a termination of the Order No. 8414238 amounted to a plan approval. Webb was involved in the lengthy discussion with MSHA about the various ventilation plans and, as such, I do not believe that Webb could, in good faith, understand that the negotiation process abruptly ended with the termination of an order.

Mach and MSHA had been involved in lengthy discussions about the base ventilation plan, as well as the specific plan for Headgate No. 3, at the time Long issued his Order No. 8414529. Yet, MSHA had not issued a "technical citation" as it does when an impasse is reached in a plan negotiation.

A corrected condition is not the same as approval of a new ventilation plan. The termination of Order No. 8414238 was not a de facto plan approval because, as the regulation makes clear, a proposed ventilation plan may not be implemented before the MSHA district manager approves it. 30 C.F.R. § 75.372(d). The district manager must "notify the operator in writing" of the approval or denial of a proposed ventilation plan." 30 C.F.R. § 75.370(c)(1). Given the regulatory requirements for a ventilation plan, the fact that only the district manager may approve the plan, and that the approval must be in writing, I find that the mine violated the mandatory standard as alleged.

2. *Significant and Substantial Violation*

Inspector Long determined that it was unlikely that the cited condition would result in the injury of a miner and that the violation was not significant and substantial. However, given the fact that the mine had mined a "stair-step" type of configuration in the bleeder system without seeking approval, and had resumed mining with no clear direction or specifically written, thought-out plan for the ventilation of the working area, I find the violation to be serious.

3. *Unwarrantable Failure*

Inspector Long determined that the operator's negligence was high and designated the order as an unwarrantable failure. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Long issued the order as an unwarrantable failure based upon the conversations he had with the mine prior to the issuance of the order. He spoke with Webb a number of times about the plan and discussed that the mine was waiting for approval. Long was directed to issue the order and the District Manager suggested that it be marked as reckless disregard. However, since Long was not privilege to the many conversations and negotiations between Mach and the district, he issued the order as he believed appropriate, with a high negligence designation. Long indicated that Webb knew he had no ventilation plan in place and was placed on notice that he could not mine the Headgate No. 3 area without an approved plan. Still, Webb moved forward and began mining. As noted above, I do not agree that Webb had a good faith belief that there was a plan in place based upon the termination of the order. Jones terminated the original order, and Webb testified that he believed immediately, on September 9, 2009, that his plan had been approved. Still Webb questioned Jones and his supervisor about the effect of the order, but still failed to contact the one person who could provide a definitive answer, the District Manager. Webb told Long multiple times that the mine continued to wait for plan approval after September 9, 2011, and Long advised Webb multiple times that he could not begin mining without that plan. The violation was obvious and was done with full knowledge of the operator, as the mine intentionally began mining without a plan in place. While the violative condition may not have existed for an extended period of time, I agree with the Secretary's argument that, for purpose of this unwarrantable failure analysis, "the violative act itself outweighs the short period of time between action and discovery." Sec'y Br. 12.

Mach argues that there was a good faith disagreement over the meaning of the termination of Order 8414238. Mach avers that Long testified that he was confused as to the terminations' meaning. Moreover, Mach alleges that no MSHA representative ever told Mach that a citation would be issued if mining resumed in Headgate No. 3. However, Long did advise Mach that a citation would be issued if mining resumed, and he continued to discuss the matter for the entire time from September 9, 2009, when the termination order was issued by Jones,

until September 21, 2009, when Long issued the order discussed herein. I agree with Long and find that, at best, the mine demonstrated a serious lack of reasonable care. I am not persuaded by Webb's arguments and find them disingenuous given his background and his involvement in the plan approval process. I find that the violation was the result of an unwarrantable failure to comply and consequently assess a penalty of $5,000.00 for the violation.

II. PENALTY

The principles governing the authority of Commission administrative law judge to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(I).

I accept the parties' stipulation that the penalty proposed is appropriate to this operator's size and will not effect its ability to continue in business. The mine is a large operator and has an unusually large number of ventilation plan violations given its short operating time. I agree with Long that Mach demonstrated high negligence, and I find that the mine demonstrated a serious lack of reasonable care that bordered on intentional misconduct. Although the inspector designated the violation as non-S&S, I find that operating without an approved ventilation plan is a serious violation. I assess a penalty of $5,000.00 for Order No. 8414529.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess the $5,000.00 penalty listed above for the subject order. Mach Mining, LLC, is hereby **ORDERED** to pay the Secretary of Labor the sum of $5,000.00 within 30 days of the date of this decision. The Notice of Contest is **DISMISSED.**

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. Certified Mail)

Edward V. Hartman, U.S. Department of Labor, 230 S. Dearborn St., Room 844, Chicago, IL 60604

Christopher Pence, Allen Guthrie & Thomas, PLLC, 500 Lee Street, East, Suite 800, P.O. Box 3394, Charleston, WV 25333-3394